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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 644

BANKS & RUMBAUGH, PETITIONER

v.

MARTIN P. DURKIN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 44-45) is not officially reported. The opinion of the United States Court of Appeals (R. 51-57) is reported at 201 F. 2d 223.

JURISDICTION

The judgment of the court below was entered on January 14, 1953 (R. 57). The petition for certiorari was filed on March 5, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether judicial enforcement of a subpoena *duces tecum* issued by the Administrator of the Wage and Hour Division, pursuant to Section 11(a) of the Fair Labor Standards Act, is dependent upon a prior judicial determination that petitioner is within the coverage of that Act.

STATUTES INVOLVED

The statutory provisions are Sections 9 and 11 (a) of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C. 201 *et seq.*,[1] Section 9 of the Federal Trade Commission Act, c. 311, 38 Stat. 717, 15 U. S. C. 49, and Section 6 (c) of the Administrative Procedure Act (c. 324, 60 Stat. 237, 5 U. S. C. 1005 (c)). These provisions are set forth in the Appendix, *infra*, pp. 11-13.

STATEMENT

The subpoena *duces tecum* here involved was issued by the Administrator of the Wage and Hour Division on September 26, 1951 (R. 11). Under its terms, petitioner was required to produce its records relating to its wage and hour practices and to its business for oil companies for the period from July 1, 1950, to that date, at a designated place in Odessa, Texas on October 9, 1951 (R. 9-10).

Representatives of petitioners appeared on the date and at the place designated in the subpoena,

[1] The cited sections of the Fair Labor Standards Act of 1938 are not affected in any way by the Fair Labor Standards Amendments of 1949 (c. 736, 63 Stat. 910, 29 U. S. C. Supp. V, 201).

but only to state again that the records sought thereby would not be produced or made available to the Division (R. 4, 14; Para. 10). Following this refusal, respondent applied to the district court for an enforcement order. His application alleged, on information and belief, that petitioner is "engaged * * * in the production of goods for interstate commerce, as that term is defined by the Act" in that it is "engaged in oil field construction work for concerns engaged in the drilling for and production of crude petroleum, substantial quantities of which are thereafter shipped in interstate commerce in its crude form or as a refined product" (R. 2-3). It also alleged that all the books, papers and documents referred to in the subpoena "were at the time of the issuance of said subpoena duces tecum, and are now, relevant, material, and appropriate to determine whether the company has violated * * * the Act, and will aid in the enforcement of the provisions of the Act" (R. 4).

Petitioner's answer, filed in response to the application for an enforcement order, asserted that its oil field construction work was "of an essentially local nature" and, therefore, not subject to the Act (R. 14-15). The answer also asserted that respondent was "embarked on a mere fishing expedition, unwarranted in fact or in law" (R. 15). As the Court of Appeals noted, the answer contained "no allegations that the subpoena made unreasonable demands or that compliance therewith would be unreasonably burdensome, or would result in undue hardship" (R. 52). Nor was there

any allegation that the time and place named for the production was inappropriate or inconvenient. "Thus, the only issue joined by the pleadings was whether or not the corporation and its employees were subject to the provisions of the Act * * *" (R. 52). The trial court held that it had jurisdiction to decide this issue and concluded, upon the basis of the evidence adduced at the hearing, that petitioner and its employees were not subject to the Act. The relief sought by respondent was denied by the trial court solely on this ground.

The Fifth Circuit reversed, ruling that under this Court's decisions in *Endicott Johnson Corp.* v. *Perkins,* 317 U. S. 501, and *Oklahoma Press Pub. Co.* v. *Walling,* 327 U. S. 186, the "District Court was not authorized to decide the question of coverage" in a subpoena enforcement action since "'Congress has authorized the Administrator * * * rather than the district court in the first instance, to determine [it] * * * in the preliminary investigation of possibly existing violations'" (R. 53). Petitioner's contention that the law as expounded in those decisions had been changed by the Administrative Procedure Act was rejected (R. 54-56), as was its contention that the question of coverage had become one for the courts by reason of an earlier inspection (R. 56). In the latter connection, the Court of Appeals made the observation that the "duty of the Administrator to investigate violations of the Act is a continuing one" (R. 56).[2]

[2] The record shows that when the earlier inspection was made petitioner did not dispute coverage and agreed to comply

ARGUMENT

The decision below is plainly a correct application of this Court's decisions in *Oklahoma Press Pub. Co.* v. *Walling,* 327 U. S. 186, and *Endicott Johnson Corp.* v. *Perkins,* 317 U. S. 501, and it presents no conflict with the decision of any other circuit court of appeals. The decisions of the courts of appeals subsequent to this Court's decisions in the *Oklahoma Press* and *Endicott Johnson* cases, *supra,* have uniformly approved judicial enforcement of subpoenas substantially identical to that here involved. *Detweiler Bros.* v. *Walling,* 157 F. 2d 841 (C. A. 9), certiorari denied, 330 U. S. 819; *Holloway Gravel Co.* v. *McComb,* 174 F. 2d 421 (C.A. 5), certiorari denied, 338 U. S. 823; *McComb* v. *Hunsaker Trucking Contractor,* 171 F. 2d 523 (C.A. 5). See also *Graylyn Bainbridge Corporation* v. *Woods,* 173 F. 2d 790 (C.A. 8), certiorari denied, 337 U. S. 958, and *Mines and Metals Corp.* v. *Securities and Exchange Commission,* 200 F. 2d 317 (C.A. 9), rehearing denied, *id.,* now pending on petition for certiorari, No. 645, this Term.

The court below correctly held that there is no merit in petitioner's contention that the law as

with the Act (R. 31), so that further enforcement action then seemed neither necessary nor warranted. Therefore, the inspector made only a limited routine investigation without attempting to gather the specific evidence that is needed in an enforcement action where coverage is contested. It was not until April 2, 1951, that petitioner raised any question concerning the application of the Act to its employees. On that date, its president advised the inspector that he had "changed his mind about complying with the law" and that he was going to follow his same pay practices "until forced to do otherwise" (R. 34).

established in the above decisions has been changed by Section 6 (c) of the Administrative Procedure Act. In pertinent part, Section 6 (c) of the Administrative Procedure Act merely provides that in the event of contest the court shall sustain an agency subpoena "to the extent that it is found to be in accordance with law." Nothing in this language suggests that the duty and burden of determining the question of coverage in the first instance was intended to be shifted from the administrative agency to the courts. Recognizing this, petitioner would amend the section by adding to the phrase "in accordance with law" the words "including the authority or jurisdiction of the agency" (Br. p. 6). But Congress itself deliberately and advisedly omitted these words from the section when the legislation was being considered.

The bill that became the Administrative Procedure Act, when originally introduced, read as follows with respect to agency subpoenas:

> * * * Upon any contest of the validity of a subpena or similar process or demand, the court shall determine all relevant questions of law raised by the parties, *including the authority or jurisdiction of the agency,* and in any proceeding for enforcement shall enforce (by the issuance of an order requiring the production of the evidence or data under penalty of punishment for contempt in a case of contumacious failure to do so) or refuse to enforce such subpena accordingly. [Emphasis supplied, S. Doc. No. 248, 79th Cong., 2d Sess., p. 158].

However, as the Court of Appeals noted in another opinion on the precise question raised by petitioner, "the Attorney General and the National Labor Relations Board protested to the appropriate congressional committees that it was necessary in practice for the subpoenas to be enforced before the Board's jurisdiction could be established." *D. G. Bland Lumber Co.* v. *National Labor Relations Board,* 177 F. 2d 555, 558 (C. A. 5). Accordingly, Section 6 (c) of the Act, as enacted, was changed so as to delete the language "that would have made the jurisdiction of the agency a litigable issue in subpoena enforcement proceedings" (177 F. 2d at 558) and to require only that the subpoena be "found to be in accordance with law." The significance of this change clearly shows that "Congress intended to leave the scope of judicial inquiry unchanged upon an application for the enforcement of a subpoena" (*id.* at 558).

Though the Committee Print and Congressman Walter's statement cited in petitioner's brief (pp. 6-7) indicate otherwise, everything else in the legislative history of the Administrative Procedure Act confirms the conclusion that Section 6 (c) as enacted was not intended to change the law as expounded in the *Oklahoma Press* and *Endicott Johnson* decisions. Thus, the Committee Report which accompanied the changed Senate Bill explained that Section 6 (c)

> * * * constitutes a statutory limitation upon the issuance or enforcement of subpenas in

> excess of agency authority or jurisdiction. *This does not mean, however, that courts should enter into a detailed examination of facts and issues which are committed to agency authority in the first instance, but should, instead, inquire generally into the legal and factual situation and be satisfied that the agency could possibly find that it has jurisdiction.* * * * [Emphasis supplied, S. Doc. No. 248, 79th Cong., 2d Sess., 185 at 206.]

The House Committee Report contains substantially the same explanation. See S. Doc. No. 248, 79th Cong., 2d Sess., 233 at 265.

The Department of Justice memorandum, included in the Congressional Record by Congressman Hobbs and made a part of Senate Document No. 248, 79th Cong., 2d Session, interpreted Section 6 (c) as follows:

> Under section 6 (c) it is provided that "upon contest the court shall sustain any such subpena or similar process or demand to the extent that it is found in accordance with law." This provision is not intended to change the law as expounded in *Endicott Johnson* v. *Perkins* (317 U. S. 501, 1943), in which the Supreme Court held that subpenas issued by an agency will be accorded due respect by the Court if they are within the agency's power and that there would be no independent inquiry as to whether the particular person subpenaed comes within the coverage of the act enforced by the agency. The law as expounded in *Endicott Johnson* v. *Per-*

> *kins* is still applicable. All that this section requires is that the court determine whether the subpena issued comes within the general power of that agency. There need be no in limine inquiries as to whether the person subpenaed is or is not covered by the act. [S. Doc. No. 248, at 415; Attorney General's Additional Statement, 92 Cong. Rec. A2987, May 25, 1946. See also Attorney General's Manual on the Administrative Procedure Act, 1947, pages 68-69.]

Even without regard to the clear wording of Section 6 (c) and its legislative history as set out above, it would seem that the Court of Appeals was fully justified in refusing to read into the section language which Congress itself deliberately omitted.

Petitioner urges that if this Court's *Endicott Johnson* and *Oklahoma Press* decisions have not been abrogated by the Administrative Procedure Act, the trial court was nevertheless authorized to inquire into the question of the applicability of the Fair Labor Standards Act to its employees because the Wage and Hour Division had already examined its records and determined the question for itself. This contention completely ignores the fact that the duty of the Administrator to make investigations under the Fair Labor Standards Act, like the duty of the Federal Trade Commission to prevent unfair methods of competition and unfair or deceptive acts or practices in commerce, is a "continuing duty" and "is not suspended or exhausted" even

by a prior judicial determination (*United States* v. *Morton Salt Co.*, 338 U. S. 632 at 639).

CONCLUSION

The decision of the court below is clearly correct. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APRIL 1953.

APPENDIX

Fair Labor Standards Act, c. 676, 52 Stat. 1060 (29 U. S. C. 201 et seq.):

SEC. 9. For the purpose of any hearing or investigation provided for in this Act, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U. S. C., 1934 edition, title 15, secs. 49 and 50), are hereby made applicable to the jurisdiction, powers, and duties of the Administrator, the Secretary of Labor, and the industry committees.

* * * * *

SEC. 11. (a) The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. Except as provided in section 12 and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Depart-

ment of Labor for all the investigations and inspections necessary under this section. Except as provided in section 12, the Administrator shall bring all actions under section 17 to restrain violations of this Act.

Federal Trade Commission Act, c. 311, 38 Stat. 717 (15 U. S. C. 49):

SEC. 9.

* * * * *

* * * in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

* * * * *

Administrative Procedure Act, c. 324, 60 Stat. 237, (5 U.S.C. 1001 *et seq.*):

SEC. 6 * * *

* * * * *

(c) Subpenas.—Agency subpenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought. Upon contest the court shall sustain any such subpena or similar process or demand to the extent that it is found to be in accordance with law and, in any proceeding for enforcement, shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

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